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IN THE

Supreme Court of the United States

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FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of sixty-four national and international unions representing more than thirteen million working women and men, files this brief *amicus curiae* in support of Petitioner with the consent of the parties, as provided for in the Rules of this Court.

STATEMENT

1. The Shipping Act of 1984, 46 U.S.C. app. §§ 1701 *et seq.*, sets out Congress' comprehensive scheme for regulating oceanborne commerce and, as an aspect thereof, "marine terminal operators"—*viz.*, operators of domestic port facilities in interstate and foreign commerce.[1] As *California v. United*

[1] The principal substantive provisions of the Shipping Act of 1984 are carried over from the Shipping Act of 1916, 39 Stat. 728.

States, 320 U.S. 577, 585-86 (1944), makes clear, Congress has the constitutional authority to enact such legislative regulations and to make its enactment run to State marine terminal operators such as the Respondent South Carolina State Ports Authority ("SCSPA").

As an integral part of the Shipping Act scheme, Congress established the Federal Maritime Commission ("FMC," or "the Commission"), an administrative agency composed of five Commissioners who are appointed by the President by and with the advice and consent of the Senate and who are removable by the President "for inefficiency, neglect of duty, or malfeasance in office." Reorganization Plan No. 7 of 1961, Part I, §§ 102(a), 75 Stat. 840. And, Congress empowered the FMC, "as the expert body . . . for safeguarding this specialized aspect of the national interest," *California v. United States*, 320 U.S. at 584, to administer the Shipping Act's provisions, Reorganization Plan No. 7 of 1961, Part I, §§ 101-103, 75 Stat. 840. [2]

In carrying out its regulatory responsibilities, the FMC performs a range of administrative tasks, including the issuing of licenses, the promulgation of rules and regulations, the institution of investigations, and the monitoring of compliance with the Act's requirements. *See* 46 U.S.C. app. §§ 1704-09, 1714, 1716, 1718.

Of immediate relevance here, Congress has, through § 11 of the Shipping Act, 46 U.S.C. app. § 1710, authorized the

[2] Since the enactment of the Shipping Act of 1916, Congress' regulatory mandate has been administered by an administrative agency, variously denominated as the "United States Shipping Board" from 1916-33, see 39 Stat. 728 (1916), the "United States Shipping Board Bureau" from 1933-36 see Executive Order No. 6166, § 12 (1933), the "United States Maritime Commission" from 1936-50, 49 Stat. 1985 (1936), the "Federal Maritime Board" from 1950-61, see Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and, since 1961, the FMC, see Reorganization Plan No. 7 of 1961, Part I, §§ 101, 75 Stat. 840.

FMC to investigate complaints alleging a marine terminal operator's non-compliance with the Shipping Act through an administrative process culminating in an FMC report and order.[3]

When "any person" files such a complaint, the named respondent, and upon notice by the FMC, the named terminal operator must either "satisfy the complaint or answer it in writing." *Id.* § 1710(b). If the complaint is not satisfied, the Act provides that "the Commission shall investigate it in an appropriate manner and make an appropriate order." *Id.*

In the event of a formal complaint, the Commission discharges its duty to "investigate [the complaint] in an appropriate manner" through the adjudication process delineated in the Administrative Procedure Act, 5 U.S.C. § 554. *See* 46 C.F.R. § 502.142. The Commission employs Administrative Law Judges ("ALJs") and delegates to the ALJs the responsibility of holding hearings that generate an administrative record on which the Commission bases its decision, and of-forwarding to the Commission "initial or recommended" findings of fact and conclusions of law, 46 C.F.R. § 502.223, which are subject to plenary review by the Commission, either at the instance of a party or on the Commission's own motion. 46 C.F.R. § 502.227(a)(6).

The Commission is required to "make a written report of every investigation made under this chapter in which a hearing was held stating its conclusions, decisions, findings of fact, and order." 46 U.S.C. app. § 1710(f). An FMC "report" is not self-enforcing and does not have any of the coercive legal force and effect of a judicial decision and order. Rather, its independent force and effect is that of an authoritative statement by the federal agency, charged with

[3] The statute provides in relevant part that "[a]ny person may file with the Commission a sworn complaint alleging a violation of this chapter . . . ." 46 U.S.C. app. § 1710(a).

the administration of the Shipping Act, of the agency's factual and legal determinations on the marine terminal operator's compliance with the Act ("its conclusions, decisions, [and] findings of fact," 46 U.S.C. app. § 1710(f)) and the agency's directions ("its . . . order," *id.*) as to what actions the terminal operator needs to take to bring itself into compliance with the Act. To have coercive legal force and effect, a Commission "report" must be enforced by an Article III federal court and the Commission order must be embodied in a judgment issued by the court. *See* 46 U.S.C. app. §§ 1713(c) and (d).[4]

2. In this case, a private party, South Carolina Maritime Services, Inc. ("Maritime Services"), filed a formal complaint with the Commission alleging that the South Carolina State Ports Authority was discriminatorily denying Maritime Services a berth at SCSPA's Charleston, South Carolina marine terminal in violation of the Shipping Act. Joint App. 7-17. The complaint requested that the Commission (1) seek injunctive relief in federal district court enjoining SCSPA from denying Maritime Services berthing rights; (2) direct the SCSPA to pay reparations for Maritime Services' lost profits and business opportunities by reason of SCSPA's denial of berthing rights; and (3) direct SCSPA to cease and desist from denying Marine Services berthing rights in violation of the Shipping Act. Joint App. at 16.

The SCSPA moved to dismiss on the ground relevant here that the Eleventh Amendment bars FMC administrative

[4] The Shipping Act provides two principal judicial enforcement mechanisms: For "nonreparation orders"—that is, orders adjudging a regulated entity in violation of a Commission order or subpoena—"the Attorney General, at the request of the Commission, or any party injured by the violation, may seek enforcement by a United States district court having jurisdiction over the parties." 46 U.S.C. app. § 1710(c). For reparation orders, the statute provides that "the person to whom the award was made may seek enforcement of the order in a United States district court having jurisdiction of the parties." *Id.* § 1710(d).

proceedings against a State on Maritime Services' complaint. Joint App. 41-44. The ALJ agreed and ruled that the complaint proceedings be terminated. Pet. App. 49a-62a.

The FMC reviewed this initial decision on its own motion and determined that the SCSPA was not immune from Commission administrative proceedings by virtue of the State's Eleventh Amendment immunity/constitutional sovereign immunity. Pet. App. 29a-35a. Consequently, the Commission reversed the ALJ's decision and remanded the matter with directions that the ALJ consider the remaining arguments SCSPA made in support of its motion to dismiss. Pet. App. 37a. SCSPA thereupon petitioned the Court of Appeals for the Fourth Circuit for review of the Commission's decision.

The Fourth Circuit reversed the Commission's determination and remanded the case with instructions to dismiss the FMC complaint proceeding. In so doing the Court of Appeals ruled that state sovereign immunity bars "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states," Pet. App. at 13a, and that this rule holds whether the proceeding takes the form of an administrative adjudication "within the Executive Branch" or a judicial adjudication, *id* at 15a.

SUMMARY OF ARGUMENT

The States' Eleventh Amendment immunity/constitutional sovereign immunity is an immunity from one particular means of enforcing federal legislation: *private party lawsuits* in a *judicial* forum. Where a private party lawsuit against a State seeks a coercive judicial order in the form of a *money judgment*, this Court has, moreover, hewed to the strictest view of State sovereign immunity so as to protect the State fisc from coercive judicial exactions at the instance of private parties.

At the same time, the Court has made it clear that the States have *no* Eleventh Amendment immunity and *no* constitutional sovereign immunity against federal government lawsuits in judicial fora—even when those lawsuits seek a money judgment against a State.

This case involves a congressional authorization to a federal administrative agency to exercise administrative law enforcement powers—powers far more limited than the coercive power of judicial tribunals—to investigate private party complaints of state non-compliance with federal law and to issue an agency report on its findings and conclusions and an agency compliance order.

This agency law enforcement power is an executive power analogous to a federal executive officer's law enforcement power to investigate state compliance with federal law and, on finding cause to believe that there is noncompliance, to bring a federal government lawsuit against the State. In both instances, Congress has authorized politically accountable federal government officers to act, on behalf of the Federal Government, to enforce a valid, binding federal law against the States. That being so, it follows from the developed state sovereign immunity jurisprudence that both of these authorizations to exercise federal government law enforcement power are constitutionally permissible, and that neither one is subject to a state sovereign immunity bar.

The Court of Appeals, to the contrary, vouchsafed the States an immunity here on the proposition that "any proceeding in which a federal officer adjudicates disputes between private parties and unconsenting states" is constitutionally invalid, irrespective of "whether the forum be a state court, a federal court, or a federal administrative agency." Pet. App. 13a. The Court of Appeals' proposition is false in that it rests on a false equation of administrative adjudications and judicial adjudications. The agency officers are politically accountable executive officers of the United

States, not politically unaccountable judicial officers; and the agency is empowered to issue reports and orders that are not self-enforcing, not to issue judicial decisions and orders with coercive legal force and effect. In every regard, then, a private party complaint invoking administrative agency law enforcement power and the resulting proceeding and agency action and a private party lawsuit invoking the judicial power and the resulting proceedings and judicial action are of a different legal order in their nature and consequences.

ARGUMENT

It is settled beyond peradventure that Congress has the constitutional authority to regulate the operation of marine terminal facilities in interstate and foreign commerce through the Shipping Act and to empower the Federal Maritime Commission ("FMC"), as an administrative agency of the United States, to enforce the Act, *inter alia*, through administrative proceedings on "any person['s]" complaint that a regulated entity is in non-compliance with the Act, leading to an FMC "report" enforceable in a federal court proceeding.

We submit that, where a State is the maritime terminal operator, nothing in the Constitution stands in the way of such a Congressional exercise of its Article I legislative power or of such a legislatively authorized FMC exercise of the federal government's law enforcement power. The States' Eleventh Amendment immunity/state sovereign immunity is an immunity against the invocation by a *private party* of the *judicial power*. It is *not* a more generalized immunity against federal legislative regulation through enactments such as the Shipping Act, nor is it an immunity against law enforcement actions by, and in the name of, the Federal Government, such as the FMC's investigation of a formal complaint and the agency's report thereon stating the

agency's conclusions, decisions, findings of fact, and compliance order.

1. The States' Eleventh Amendment immunity/constitutional sovereign immunity is an immunity from one particular means of enforcing federal legislation: *private party lawsuits* in a *judicial* forum.

The Eleventh Amendment in terms forbids the exercise of "*[t]he Judicial power* of the United States" to entertain "*any suit* in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or Subjects of any Foreign State." U.S. Const., Amen. XI (emphasis added). And, the decisions of this Court treating with the States' Eleventh Amendment immunity in its particulars, and with the States' constitutional sovereign immunity as a more general protection, describe the immunity as one from the exercise of judicial power at the behest of a private party. *See, e.g., In re Ayers*, 123 U.S. 443, 505 (1887) ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process *of judicial tribunals at the instance of private parties*." (emphasis added)); *Hans v. Louisiana*, 134 U.S.1,13 (1890) ("'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" (quoting The Federalist No. 81)); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States." (citation and internal quotation marks omitted)).

Where a private party lawsuit against a State seeks a coercive judicial order in the form of a *money judgment*, this Court has, moreover, hewed to the strictest view of State

sovereign immunity so as to protect the State fisc from coercive judicial exactions at the instance of private parties.[5]

Of equal moment here, the Court has made it clear that the States have *no* Eleventh Amendment immunity and *no* constitutional sovereign immunity against federal government lawsuits in judicial fora—even when those lawsuits seek a money judgment against a State. *See, e.g., Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934) (federal court jurisdiction over "a suit by the United States against a State ... without the consent of the latter ... is inherent in the constitutional plan" and collecting cases); *United States v. Texas*, 143 U. S. 621, 644-645 (1892) ("We cannot assume that the framers of the constitution, while extending the

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[5] As this Court emphasized in *Hans v. Louisiana*, 134 U.S. 1 (1890)—the fountainhead of Eleventh Amendment/constitutional state sovereign immunity jurisprudence—invoking federal court jurisdiction to seek damages remedies against an unconsenting State, as the *Hans* plaintiff attempted, cuts to the heart of the State's immunity:

> '[T]here is no color to pretend that the state governments would, by the adoption of [the plan of the Constitutional Convention], be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. .... [T]o ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.' [134 U.S. at 13 (quoting The Federalist No. 81 (Hamilton).]

See also Great Northern Life Ins. v. Read, 322 U.S. 47, 54 (1944) (noting that "when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration" only a clear statement of the State's consent "to submit its fiscal problems" to the federal courts "must be found")

This Court's treatment of private party lawsuits for *prospective relief* supplies an illuminating contrast. While adhering to the concept of the States' sovereign immunity, the Court has permitted such suits to go forward pursuant to the doctrine of *Ex Parte Young*, 209 U.S. 123, 159-60 (1908).

judicial power of the United States to controversies between two or more states of the Union, and between a state of the Union and foreign states, intended to exempt a state altogether from suit by the general government.")

This Court's recent decision in *Alden v. Maine*, 527 U.S. 706 (1999), sets out the fullest elaboration of both aspects of the Eleventh Amendment immunity/constitutional state sovereign immunity law. *Alden* explains that the "immunity [of the States] from private suits [is] central to sovereign dignity," *id.* at 715, as a protection from lawsuits in which a politically unaccountable private party can invoke the coercive process of the politically unaccountable judiciary to effect an interference with the political decisionmaking of the State; and this is particularly so where that interference takes the form of a money judgment action which would enable the private party to levy upon the State treasury.[6]

"Private suits against nonconsenting States," said the Court, "present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Alden*, 527 U.S. at 749 (quoting *In re Ayers*, 23 U.S. at 505). When the power to invoke "the coercive process of judicial tribunals" is delegated to private parties, "[n]ot only must a State defend or default but also it must face the prospect of being thrust, ... against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on [the State] treasury ...." *Alden*, 527 U.S. at 749. In that way, "[a] general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their

[6] *Alden*, in relying on the concept of general constitutional state sovereign immunity, emphasized that such an immunity was an inherent aspect of the State's *own* judicial system, and indeed distinguished the holding of *Nevada v. Hall*, 440 U.S. 410 (1979), in significant part on that ground. *See Alden*, 527 U.S. at 738-39.

citizens [regarding] the allocation of scarce resources among competing needs and interests." *Id.* at 749-50.

As *Alden* further makes clear, given the nature and theory of the States' Eleventh Amendment immunity/constitutional sovereign immunity, the States have *no* immunity against the delegation to Federal Government officers—acting for and in the name of the United States—of the power to invoke "the coercive process of judicial tribunals," including the process through money judgments of levying on the State treasury:

> A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to "take care that the laws be faithfully executed," U.S. Const., Art. II, § 3, differs in kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system, the fear of private suits against nonconsenting states was the central reason given by the Founders who chose to preserve the States' sovereign immunity. Suits by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States. [527 U.S. at 755-56.]

In sum, by "ratifying the Constitution, the States consented to suits brought ... by the Federal Government," *Alden*, 527 U.S. at 755—as suits in which "the National Government must itself deem the case of sufficient importance to take action against the State," *id.* at 759-60—but not to suits by private parties.

What Congress does in authorizing federal government lawsuits is to authorize politically accountable officers of the United States, who are entrusted with the duty "to take Care that the Laws be faithfully executed," to act for and in the name of the United States to enforce federal law. And, what

this Court's state sovereign immunity decisions recognize is that such a Congressional authorization of federal government law enforcement action against a State is in no way barred by the States' Eleventh Amendment immunity/constitutional sovereign immunity. By reason of the constitutional plan, the United States is the national sovereign with both the constitutionally enumerated sovereign power to enact laws that run to the States and the sovereign power to take governmental action in its own name to enforce those laws.

2. The Court has, of course, traced out its state sovereign immunity jurisprudence in cases involving a lawsuit against a State looking to judicial proceedings and a judicial decision and order with coercive legal force and effect. And, as we have seen, in that context state sovereign immunity *is* a bar to congressional authorization to private parties to enforce federal law against a State by invoking the coercive process of judicial tribunals—but state sovereign immunity is *no* bar to congressional authorization to officers of the United States, acting by and on behalf of the Federal Government to enforce federal law by invoking judicial power.

This case, in its turn, involves a congressional authorizeation to a federal administrative agency to exercise administrative law enforcement powers—powers far more limited than the coercive power of judicial tribunals—to investigate private party complaints of state non-compliance with federal law and to issue an agency report on its findings and conclusions and an agency compliance order.

As we develop, this agency law enforcement power is an executive power analogous to a federal executive officer's law enforcement power to investigate state compliance with federal law and, on finding cause to believe that there is noncompliance, to bring a federal government lawsuit against the State. In both instances, federal officers have and exercise a federal government law enforcement power to

take action against the State through the legal process. It follows from the developed state sovereign immunity law that in both instances there is no immunity bar to the federal government law enforcement action. And, that being so, it would stretch state sovereign immunity past the breaking point to grant that immunity on the basis that the agency law enforcement action is taken on the petition of a private party for such agency action in the form of a complaint that forms the basis for an APA administrative adjudicatory proceeding.

(a) The Federal Maritime Commissioners—through whom the Commission acts—are constitutional "Officers of the United States," within the contemplation of U.S. Const. Art. II, § 2, cl. 2, empowered to exercise "significant governmental dut[ies] pursuant to public law," *Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976). The Commissioners are appointed by the President and can be removed by the President for cause.[7] The Commissioners, like the federal executive officers who are authorized to bring federal government lawsuits, are thus politically accountable federal officers "who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed,'" *Alden*, 520 U.S. at 755 (citation omitted).

(b) To enable the Commissioners to carry out that duty, Congress has empowered the Commission to administer the Shipping Act and secure its enforcement by promulgating rules and regulations; issuing and revoking licenses; conducting investigations and issuing reports stating its findings, conclusions, and orders; pursuing court actions; and

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[7] While the President's power to remove Commissioners for "inefficiency, neglect of duty, or malfeasance in office," Reorganization Plan No. 7 of 1961, Part I, §§ 102(a), 75 Stat. 840, is not plenary, as is the case with, say, Cabinet-level agency officers, the statutory grounds for removal are, as this Court has held in another context, "very broad" and "could sustain removal ... for any number of actual or perceived transgressions." *Bowsher v. Synar*, 478 U.S. 714, 729 (1986).

invoking the aid of the Attorney General to secure judicial enforcement of its administrative actions in court. *See* 46 U.S.C. app. §§ 1704-10, 1714, 1716, 1718.

In all of these endeavors, the Commission—acting through the Commissioners—exercises *executive power*. As Justice Scalia succinctly and accurately put the point in general terms, "administrative board[s of the United States] exercise the executive power, not the judicial power of the United States." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment). And, as he added in specifics, this is true of all such boards that act through executive officers—both those that are "subdivisions of traditional executive departments" like the "Comptroller of the United States," which is "within the Treasury Department," *id.*, and those that are independent regulatory agencies such as the Federal Communications Commission or the National Labor Relations Board, *id.* at 912.

And, as Justice Scalia stressed, an administrative agency acting through an administrative adjudicative process, no less than an agency acting through a rule-making process, is exercising executive power:

> The first Patent Board, which consisted of Thomas Jefferson, Henry Knox, and Edmund Randolph in their capacities as Secretary of State, Secretary of War, and Attorney General, respectively, 1 Stat. 109, 110 (1790), adjudicated the patentability of inventions, sometimes hearing argument by petitioners. *See* 18 J. Pat. Off. Soc. 68-69 (July 1936). They were exercising the *executive* power. *See* Easterbrook, "Success" and the Judicial Power, 65 Ind. L. J. 277, 280 (1990). Today, the Federal Government has a corps of administrative law judges numbering more than 1,000, whose principal statutory function is the conduct of adjudication under the Administrative Procedure Act (APA), *see* 5 U.S.C. 554, 3105. They are all *executive* officers. "Adjudication," in other words, is no more an "inherently" judicial function than the promulgation of rules governing primary conduct is an "inherently" legislative one. *See Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); APA, 5 U.S.C. 553 ("Rule making"). [*Freytag*, 501 U.S. at 910 (Scalia, J., concurring in part and concurring in the judgment).]

It is very much to Justice Scalia's last point that the FMC's power to conclude an agency proceeeding by issuing an agency report "stating the Commission's conclusions, decisions, [and] findings of fact" on its investigation of a noncompliance complaint, and setting out its compliance "order" is of an entirely different and far more limited nature than a court's judicial power to conclude a lawsuit by issuing a judicial decision and judgment. The FMC's report and its compliance order are not self-enforcing and do not have the coercive legal force and effect of a judicial decision and order. In its own terms, the FMC report's sole force and effect is that generated by an authoritative statement by the federal agency charged with the administration of the Shipping Act of (a) the agency's factual and legal determinations on the marine terminal operator's compliance with the Act, and (b) the agency's directions as to what actions the marine terminal operator needs to take to bring itself into compliance with the Act. A private party who files a formal complaint with the FMC and invokes the FMC's law enforcement process is not invoking "the coercive process of [a] judicial tribuna[l]."

While Justice Scalia's *Freytag* opinion is one concurring in part and concurring in the judgment, the central issue in that case, and the one on which the Court divided, was whether the Tax Court was properly characterized, for the purposes of the Appointments Clause, as a "Departmen[t]" exercising the executive power of the United States or a "Cour[t] of law"

exercising the judicial power of the United States. *Compare Freytag*, 501 U.S. at 884-92, *with id.* at 908-22 (Scalia, J., concurring in part and concurring in the judgement). The points Justice Scalia made on the status and nature of the federal administrative agencies like the FCC, the NLRB, and the FMC, which he argued applied to the Tax Court as well, state settled understandings and were not disputed by the *Freytag* majority, which instead disputed their applicability to the Tax Court as an Article I court.[8]

The short of the matter is that the FMC, in investigating private complaints of Shipping Act noncompliance by a State and in issuing a Commission report "stating its conclusions, decisions, findings of fact, and order"—like a federal executive officer investigating a State's compliance with federal law and then bringing a federal government lawsuit against the State—is exercising an executive power. In both instances, Congress has authorized politically accountable federal government officers to act, on behalf of the Federal Government, to enforce a valid, binding federal law against the States. That being so, both of these authorizations to exercise federal government law enforcement power are

[8] Indeed, the *Freytag* Court was at pains to stress that its opinion did not "address ... any question involving the appointment of an inferior officer by the head of one of the principal agencies." 501 U.S. at 887 n.4. In this regard, it bears noting that, on application of the *Freytag* Court's test for determining whether the Tax Court was a "Cour[t] of law," it is plain that the FMC cannot by any stretch be considered such a court. Unlike the Tax Court—which, as the *Freytag* Court stressed, exercises "judicial power to the exclusion of any other function" and which exercises such "quintessentially judicial" powers as the power to grant injunctive and monetary relief and to enforce those judgments through contempt, *id.* at 891—the FMC "perform[s] multiple [administrative] functions," *id.* at 892, and does not have the authority to grant orders with the coercive legal force and effect of a court judgment.

constitutionally permissible, and neither one is subject to a state sovereign immunity bar.[9]

3. The Court of Appeals, to the contrary, vouchsafed the States an immunity here on the proposition that "any proceeding in which a federal officer adjudicates disputes between private parties and unconsenting states" is constitutionally invalid, irrespective of "whether the forum be a state court, a federal court, or a federal administrative agency." Pet. App. 13a.

The Court of Appeals' proposition is false in that it rests on a false equation of administrative adjudications and judicial adjudications: The agency officers here are politically accountable executive officers of the United States, not politically unaccountable judicial officers; and the agency is empowered only to issue reports and orders that are not self-enforcing, not to issue judicial decisions and orders with coercive legal force and effect. In every regard, then, a private party complaint invoking administrative agency law enforcement power, on the one hand, and a private party lawsuit invoking the judicial power, on the other, are of a different legal order in their nature and consequences.

4. We emphasize that we have addressed *only* the question of the State's immunity in the FMC administrative law enforcement proceeding presented by this case and that we have not addressed the question of state sovereign immunity to a private party lawsuit against a State seeking enforcement of an FMC report and order. This is because there has been no such enforcement lawsuit here and, as interesting as the

[9] As stated in footnote 4, above, Congress has provided for different means of judicial enforcement with respect to administrative reparation and nonreparation orders. Both forms of relief were sought by the complainant in this proceeding, but the only question before this Court is whether the State has a valid sovereign immunity defense to the FMC proceeding itself.

question of the State's immunity to such a lawsuit may be, it is simply not presented by this case. We should note, however, that a private party lawsuit invoking the coercive process of judicial tribunals would at least implicate the substance of state sovereign immunity jurisprudence in a way that this case does not. At the same time, the lawsuit would be based on the law enforcement action of a federal administrative agency in the form of the agency report stating the agency's conclusions, decisions and findings of fact regarding a State's compliance with a valid and binding federal law and setting out the agency's compliance order addressed to the State. In that sense, such an enforcement lawsuit is markedly different from a lawsuit initiated *entirely* by a politically unaccountable private party invoking the coercive process of a politically unaccountable judicial tribunal to pursue the party's private right of action. Thus, the immunity question posed by an enforcement lawsuit is a novel and complex one that should await resolution in a case that in fact raises that question.

* * *

Over the past several years, this Court has invalidated on state sovereign immunity grounds a number of congressional efforts to provide for the effective enforcement of valid, binding federal laws against the States. *See, e.g., Board of Trustees of Univ. Of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U. S. 62 (2000); *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (1996). Indeed, in the 1998 Term, the Court invalidated three such statutes in one day. *See Alden v. Maine*, 527 U. S. 706, 755 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627, 636 (1999).

Propelled by the gathering force of this furthering wind, the parties in three cases before the Court this Term are seeking

to greatly extend the state sovereign immunity bar by having three additional congressional enactments providing for the enforcement of valid, binding laws against the States limited or invalidated.[10] In each of these cases, we believe, invalidation would require a significant extension of existing doctrine and would frustrate even further the continuing efforts of the Legislative Branch to provide for effective enforcement of duly enacted and valid laws. As we have shown, no such extension is warranted here. Rather, due regard for the proper role of each branch of the Federal Government requires reversal of the judgment below.

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[10] In addition to this case, see *Raygor v. Regents of the University of Minnesota*, No. 00-1514, 121 S. Ct. 2214 (*cert. granted* June 4, 2001); *Mathias v. WorldCom Technologies, Inc.*, No. 00-878, 121 S. Ct. 1224 (*cert. granted* March 5, 2001).

CONCLUSION

For the foregoing reasons, the decision and judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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